Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms: explanatory notes to final report

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I. Introduction

1. The present document serves as a companion to the report of the United Nations High Commissioner for Human Rights to the Human Rights Council on improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms (A/HRC/38/20) (the "High Commission's main report"). It explains how OHCHR's research has been taken into account in the development of the policy objectives and supporting elements set out in the annex of the High Commissioner's main report with the aim of assisting policy-makers tasked with translating these policy objectives and supporting elements into specific domestic contexts.[1]

A. Background, methodology and relationship to OHCHR's wider programme of work on accountability and remedy for business-related human rights abuses

2. The High Commissioner's main report, together with this explanatory addendum, marks the conclusion of the second phase of the OHCHR Accountability and Remedy Project. The project was launched in 2013 with the aim of helping States strengthen their implementation of the pillar on access to remedy in the UN Guiding Principles on Business and Human Rights.[2] Its first phase, concluded in June 2016,[3] explored the role and use of *judicial mechanisms* (i.e. domestic courts) including in cross-border cases.[4]

3. The Human Rights Council, in its resolution 32/10, welcomed OHCHR's work, and made a follow up request for OHCHR to continue its work on accountability and remedy with regards to State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context.[5] The second phase of the Accountability and Remedy Project has focussed on substantive and practical issues to improve the effectiveness of *State-based non-judicial mechanisms* in achieving corporate accountability and access to remedy in cases of business related human rights abuse.

4. This second phase of work, on State-based non-judicial mechanisms was conducted over a nearly two-year period (July 2016 - April 2018). It involved desk-based research and several empirical information-gathering processes to better understand (a) the extent to which State-based non-judicial mechanisms are used in practice, (b) the extent to which (and the different ways in which) these mechanisms respond to various aspects of the "effectiveness criteria" for non-judicial mechanisms in the UN Guiding Principles on Business and Human Rights[6] and (c) the experiences of rights-holders and other stakeholders.[7]

5. Following the approach of the first phase of the project (i.e. on *judicial mechanisms*),[8] the High Commissioner's main report (i.e. on *State-based non-judicial mechanisms*) includes an opening narrative section, followed by a technical annex with recommended action arranged in a series of *policy objectives* supplemented by supporting *elements* designed to show how the policy objectives can be achieved in practice.

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[1] On the target audience for the High Commissioner's main report and this addendum see further A/HRC/38/20, paragraph 19.

[2] See A/HRC/17/31, annex

[3] A/HRC/32/19 and Add. 1

[4] This first phase was requested by the Human Rights Council in its resolution 26/22, paragraph 7.

[5] See A/HRC/Res/32/10, paragraph 13

[6] A/HRC/17/31, annex, principle 31.

[7] A brief description of OHCHR's methodology, can be found in the High Commissioner's main report, see A/HRC/38/20, paragraph 15. For further information see the discussion paper prepared by OHCHR for the 6th Annual UN Annual Forum on Business and Human Right, 27-29 November 2017, http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf, at p. 7.

[8] See A/HRC/32/19 and Add.1.

6. The second phase of the project builds upon OHCHR's earlier work on judicial mechanisms.[9] Although judicial mechanisms and State-based non-judicial mechanisms are conceptually and functionally distinct, access to effective remedy can be enhanced by creating opportunities, where appropriate, for State-based non-judicial mechanisms to make use of and contribute to judicial processes. Consistent with the position taken in the Guiding Principles that effective judicial mechanisms are the "at the core" of ensuring access to remedy, the recommended action in the annex to the High Commissioner's main report presumes the existence of effective domestic law regimes and judicial mechanisms. The recommended action in the annexes of the High Commissioner's two reports[10] should therefore not be treated as separate, but as mutually reinforcing and complementary.

Terminology and numbering used in the report and this addendum

This explanatory addendum provides background and contextual information with respect to each of the policy objectives and supporting elements found in the annex to A/HRC/38/20. In the annex, the policy objectives are indicated in bold, and their supporting elements (designed to show how the policy elements can be implemented in practice) are the numbered paragraphs that follow. These supporting elements are referenced in this addendum by the term "para.". Thus, a reference in this addendum to "para. 1.1" is a reference to the first supporting element under Policy Objective 1 in the annex to A/HRC/38/20.

B. Recognizing the diversity of State-based non-judicial mechanisms and their legal and regulatory settings

Box 1: Key concepts 1

"State-based non-judicial mechanisms" are mechanisms by which individuals and/or communities whose human rights have been adversely impacted by business activities can seek a remedy. State-based non-judicial mechanisms are distinguishable from *judicial mechanisms* (i.e. courts) by being administered by and answerable to the executive rather than judicial branch of government. The involvement of the State in their establishment and at least some aspects of their operation or administration, distinguish them from *non-State-based grievance mechanisms*.

7. There are many differences between States in legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues covered in the High Commissioner's main report (A/HRC/38/20).

8. Analysis of best practices and opportunities to improve the effectiveness of State-based non-judicial mechanisms is complicated by their diversity.[11] There is no "one-size-fits -all" approach. For example, recommended action relevant to regulatory or enforcement-type mechanisms (i.e. which derive legal authority from domestic legal regimes) will not necessarily be applicable to, or appropriate for, mediation-type mechanisms lacking formal powers of investigation and enforcement or which rely for their effectiveness on "soft law" or reputational drivers. For these reasons, the policy objectives and supporting elements in A/HRC/38/20, annex are deliberately flexible. Parts of the recommended action are subject to certain caveats (for example, that they be implemented to the extent "relevant and appropriate" in light of the mechanism's particular "mandate and functions").

[9] See A/HRC/32/19 and Add.1

[10] I.e. A/HRC/32/19 (Accountability and Remedy Project, Part I) and A/HRC/38/20 (Accountability and Remedy Project, Part II).

[11] See A/HRC/38/20, paragraphs 6-10.

9. The recommended action[12] stresses the importance of comprehensive and coherent approaches by States towards the use of State-based non-judicial mechanisms to improve accountability and remedy with regard to business-related human rights abuses, consistent with the State's international legal obligations and policy commitments and responsive to local needs. Identifying areas for improvement is a complex task, especially given the range of different regulatory regimes and areas that could be engaged. The recommended action suggests the use of a review process to identify priority areas for action (para. 1.1). In some jurisdictions, a formal legal review may be necessary. To assist with this, a model terms of reference for a formal legal review of the scope, functions and effectiveness of State-based non-judicial mechanisms is included in figure 1, below.

Figure 1: Model terms of reference addressed to a suitable review body (e.g. Ministry of Justice, law commission or domestic equivalent) to enable a review of the scope, functions and effectiveness of State-based non-judicial mechanisms relevant to business respect for human rights

1. The review body is requested to investigate and report on the following matters:

(a) How do State-based non-judicial mechanisms established in the jurisdiction currently contribute to the effective implementation of the State's international legal obligations and policy commitments with respect to accountability and remedy in cases of business-related human rights abuses?

(b) Do State-based non-judicial mechanisms established in the jurisdiction have the necessary functions, powers and resources to fulfil the mandates assigned to them? If not, what reforms or improvements could be considered?

(c) Is the present State-based system for remedy of business-related human rights abuse (i.e. comprising judicial mechanisms and State-based non-judicial mechanisms) a comprehensive and coherent one? Do State-based non-judicial mechanisms complement and support judicial mechanisms in a manner that enhances accountability and access to remedy for business-related human rights abuses? If not, what reforms or improvements could be considered to make the State-based system more effective?

(d) Are State-based non-judicial mechanisms sufficiently responsive to local needs, human rights risks and operating conditions (and particularly the type, nature and severity of human rights risks posed by the activities of business enterprises within the jurisdiction)? If not, what reforms or improvement could be considered to make these mechanisms more effective?

(e) Do State-based non-judicial mechanisms respond adequately to the challenges of investigating allegations and/or handling complaints and/or resolving disputes in cases of business-related human rights abuses where the relevant parties, evidence, and/or adverse human rights impacts are located in more than one State? If not, what reforms or improvements could be considered to make these mechanisms more effective?

(f) Do the remedies that may be obtained through State-based non-judicial mechanisms in cases of business-related human rights abuses meet applicable international standards as regards the substantive and procedural requirements of an effective remedy? Are they sufficiently responsive to gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization? If not, what reforms or improvements could be considered to make these mechanisms more effective?

2. The review body is requested to make recommendations that take into account:

(a) The UN Guiding Principles on Business and Human Rights

(b) Other applicable international standards and guidance relating to corporate

[12] A/HRC/38/20, annex

accountability and access to remedy in cases of business-related human rights abuses;

(c) Where relevant, the commitments made by the jurisdiction in its national action plan;

(d) Its findings in relation to the issues described in paragraph 1 above;

(e) International human rights treaties and other relevant treaties, bilateral and multilateral agreements that the State is party to, including, where appropriate, relevant recommendations made to the State by relevant treaty bodies and peer review mechanisms

3. The review process will be public, open, inclusive and evidence-based and will involve:

(a) A review structure that will provide adequate opportunities for contribution by key stakeholders;

(b) Proper consultation with legal professionals, criminal justice practitioners, public interest lawyers, members of the judiciary, parliamentarians, academics, rights-holders and their representatives, national human rights institutions, civil society organizations, representatives of trade unions and representatives of businesses;

(c) An examination of evidence from research, including evidence of experiences in other States with the establishment and administration of State-based non-judicial mechanisms relevant to business respect for human rights

II. Explanatory notes to the recommended action (A/HRC/38/20, annex)

A. Improving the effectiveness of State-based non-judicial mechanisms within the context of the State's broader system of laws, policies and regulatory institutions

Box 2: Key concepts 2

"Overlapping proceedings" refers to two or more sets of complaints-handling and/or dispute resolution proceedings or processes taking place in two or more settings, arising from a single event and/or similar sets of circumstances and which involve the same business enterprises.

"Representatives" in relation to a rights-holder refers to third parties who are authorised or entitled to represent and/or assist that rights-holder in connection with complaints-handling and/or dispute resolution processes of State-based non-judicial mechanisms such as legal counsel, representatives of civil society organisations or family members.

"Rights-holders" refers to the intended beneficiaries of State-based non-judicial mechanisms, particularly those whose human rights have been adversely impacted (or are at risk of being adversely impacted) by business activities.

"Stakeholders" includes rights-holders and their representatives or other persons who have an interest in the effectiveness of State-based non-judicial mechanisms as a means to enhance accountability and remedy in business and human rights cases, such as business enterprises, local communities and civil society organisations

1. Systemic effectiveness and policy coherence generally

10. There is great diversity in State-based non-judicial mechanisms relevant to business and human rights. The information-gathering activities conducted by OHCHR in phase two of the Accountability and Remedy Project identified multiple State-based non-judicial mechanisms relevant to addressing adverse human rights impacts of business activities for each jurisdiction reviewed.[13]

11. These State-based non-judicial mechanisms play an important role in implementing States' international law obligations and policy commitments with respect to protecting against human rights abuses within their respective territories and/or jurisdictions and ensuring access to remedy when such abuses take place.

12. As a first step, it is important that States are able to identify the various State-based non-judicial mechanisms operating in their respective jurisdictions that are relevant to business respect for human rights, as not all will express their mandates in explicitly human rights terms.

13. For this reason, the recommended action begins by focusing on alignment needed between the collective activities of relevant State-based non-judicial mechanisms (each with their own specific mandates and functions) and the State's international legal obligations and policy commitments relevant to business and human rights. The recommended action under policy objective 1 envisages an inclusive, evidence-based process to clarify the types of State-based non-judicial mechanisms operating within the relevant jurisdiction, and whether they are sufficiently robust and appropriate to the local context, and meeting the needs of rights-holders (para. 1.1). Further suggestions for such a review process can be found in the model terms of reference above (see Fig. 1). This process could take place as part of a national action plan on business and human rights,[14] or as part of strategies to improve access to remedy more generally. The action needed to address any deficiencies identified through the relevant review process (para. 1.2) will vary depending on local legal structures, traditions, human rights risks, and needs.

14. Few (if any) State-based non-judicial mechanisms operate in isolation. On the contrary, they are integral to well-functioning regulatory systems. Phase two of the Accountability and Remedy Project identified various ways in which the effectiveness of accountability and remedy systems can be improved by enhanced communication, cooperation and coordination between different State-based mechanisms and agencies relevant to business and human rights. Depending on the mandates and functions of the mechanisms and agencies in question, this interaction can take the form of sharing information that may help to improve the detection of breaches, assisting with investigations, raising awareness about systemic or market-related issues that may be undermining the effectiveness of regulatory initiatives, and sharing lessons learned with a view to improving effectiveness. However, the extent to which such communication, cooperation and coordination should take place is not always clear. The recommended action encourages States to consider the potential benefits of greater engagement and cooperation between different mechanisms and agencies and to take appropriate steps to facilitate this. This could be both horizontally (i.e. between mechanisms and agencies operating at the same level of government) and between mechanisms and agencies operating at different levels (for example, in a federal system, between the national and regional levels of government) (para. 1.3).

15. To enable State-based non-judicial mechanisms to continue to fulfil their mandates and to meet the needs of rights-holders in evolving circumstances, States should keep the performance of such mechanisms under review. The recommended action provides a list of areas that could be considered as part of such a review, all of which will have a bearing on, and provide valuable insights into, the extent to which these mechanisms are contributing

[13] See A/HRC/38/20, paragraphs 6 -10

[14] See UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights', December 2014, copy available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

effectively to a coherent and comprehensive State-based system for accountability and remedy in business and human rights cases (para. 1.4). (Note that Part I of the recommended action is concerned with the *overall contribution* of State-based non-judicial mechanisms to this system (i.e. questions of *systemic effectiveness*). Part II of the recommended action provides further guidance with respect to the *effectiveness of individual mechanisms*).

2. The need for realistic and readily-identifiable pathways to an effective remedy

Box 3: Key concepts 3

A "period of limitation" refers to the time limit within which a complaint or dispute must have been initiated to be valid. It may run from the time that the relevant abuse occurred, or from the time that the harm materialised, or from the time the harm or abuse became known to the affected person.

"Remedy pathway", in the case of a business-related human rights abuse, refers to the various mechanisms and processes that are used to ascertain the relevant facts and to determine, mediate and/or agree upon (depending on the nature of the processes involved) a remedial outcome. A remedy pathway may not be confined to one mechanism. In some cases, it may involve a combination of mechanisms (including judicial mechanisms and non-State-based mechanisms). A remedy pathway includes all steps from the initiation of a complaint and/or dispute to a final determination, agreement or settlement (as provided for by the relevant mechanisms and processes), including any relevant appeal or review processes.

"Remedial outcome" refers to the outcome reached at the conclusion of a remedial process or series of related processes. Remedial outcomes can be divided into two main categories: financial remedies (punitive or compensatory) and non-financial remedies (for example, restitution; measures to assist with rehabilitation of victims and/or resources; satisfaction, including public apologies; and guarantees of non-repetition).

"Standing", in relation to a State-based non-judicial mechanism, refers to the rules that govern who has the right to initiate a complaint-handling and/or or dispute resolution process under that mechanism's procedures

16. States should consider the possibility that there may be circumstances and settings in which meeting their obligations to provide access to effective remedies means providing rights-holders with a range of remedial options and choices, and providing flexibility for affected individuals and/or communities to decide on a remedial strategy that best meets their needs. Individually or in combination (as the case may be) those options need to offer rights-holders a pathway to remedy that is both realistic and readily-identifiable (policy objective 2).

17. In order for rights-holders and other stakeholders to make effective use of State-based non-judicial mechanisms, and to realistically evaluate the different options open to them (including the likelihood of different remedial outcomes) they require easy access to clear and readily understandable information about the existence, mandates, functions and powers of the different State-based non-judicial mechanisms that may be relevant.

18. For these reasons, the recommended action under policy objective 2 focuses on steps to enable rights-holders to identify the remedial options and remedy pathways most suitable to them, in light of the circumstances. Supporting elements (paras. 2.1, 2.2 and 2.3) are concerned with making information, and advisory and support services available to rights-holders in a proactive manner. Phase two of the Accountability and Remedy Project gathered information on a range of techniques used to communicate with rights-holders on different remedy pathways and options, including regional and local advice centres, toll-free telephone lines, on-line resources, "plain language" pamphlets, downloadable

information packs, and use of dedicated case-workers.[15] The most suitable providers of information and advice will vary depending on the legal structures and existing institutions of the State concerned. However, in many jurisdictions and contexts, NHRIs and other bodies with mandates expressed in human rights terms are likely to have an important role to play. Physical outreach activities (e.g. travelling "road shows", regional offices or partnerships with local civil society organisations) are frequently a key component of effective outreach strategies involving remote communities.

19. In some cases, and particularly in serious and/or complex cases, more than one mechanism, law enforcement body or regulatory agency may need to become involved. In such cases, "an understanding of the linkages and synergies in play between different bodies and mechanisms will be key."[16] The recommended action therefore includes a provision aimed at enhancing cooperation and coordination between the various mechanisms, bodies and agencies concerned (para. 2.4) and highlights a number of factors that may be taken into account in deciding the most appropriate and effective modes of cooperation and coordination. It is important that such coordination and cooperation operates as smoothly and seamlessly as possible, and does not introduce further barriers (e.g. in the form of unnecessary delays) to these processes.[17]

3. Linkages and differentiation between State-based non-judicial mechanisms and judicial mechanisms

20. In phase two of the Accountability and Remedy Project, OHCHR defined State-based non-judicial mechanisms as mechanisms administered and answerable to the executive (i.e. ministerial) rather than judicial branch of government.[18] However, this definition is not always easily applied in practice, owing to the growing use, in some jurisdictions, of "hybrid" mechanisms which operate as courts and have financial and/or administrative relationships with judicial mechanisms and/or the judiciary but which are also connected in some way to domestic executive agencies.[19]

21. After reiterating the complementary and supporting role of State-based non-judicial mechanisms vis-à-vis judicial mechanisms[20], (policy objective 3), the recommended action highlights the need for clear delineation between the roles and responsibilities of these mechanisms (para. 3.1). This is important for several reasons: because of constitutional principles of "separation of powers" (and/or other legal principles aimed at creating checks and balances on the use of governmental authority); because rights-holders and other stakeholders require clarity about their respective roles and responsibilities in order to use them effectively; and because of the possibility of overlapping proceedings[21] taking place in both judicial mechanisms and State-based non-judicial mechanisms.

22. However, the recommended action recognises that there will be circumstances (for example, cases of complicity in international crimes, or causing or contributing to other serious abuses of human rights), in which judicial remedy is the only effective remedy. It is particularly important that State-based non-judicial mechanisms (and their respective

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[15] See the discussion paper prepared by OHCHR for the 6th Annual UN Annual Forum on Business and Human Rights, note 8 above, p. 23.

[16] See the OHCHR, 'Accountability and Remedy Project Part II: How State-based NJMs respond to sectors with high risks of adverse human rights impacts', available at https://www.business-humanrights.org/sites/default/files/documents/ARPII_phase1_Sector%20Study_Part%201.pdf, pp. 20-23.

[17] See paragraph 31 below.

[18] See Box 1 above.

[19] See OHCHR "Access to Remedy for Business-Related Human Rights Abuses: A Scoping Paper", 17 February 2017, available at https://www.business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf, at p. 2, 24. 29.

[20] See A/HRC/17/31, principle 27, commentary

[21] See Box 2 above.

processes or procedures) do not prevent or limit access by rights-holders or their representatives to judicial mechanisms in such cases (para. 3.1)[22]

23. The doctrine of separation of powers is a constitutional principle applicable in many jurisdictions under which different branches of government (legislative, executive and judicial) are separate from each other to prevent abuses of power. Consequently, interactions between the different types of mechanism (i.e. judicial and non-judicial) that amount to undue interference in their respective functions and powers (and particularly interference by executive agencies in the workings of the judiciary) would be prohibited.

24. In practice, however, the processes of State-based non-judicial mechanisms and judicial mechanisms can be interlinked, for example where State-based non-judicial mechanisms are granted powers (a) to recommend criminal or quasi-criminal (i.e. administrative) proceedings; (b) to refer evidence of corporate wrongdoing to law enforcement authorities; (c) to act as a prosecutor in a criminal or quasi-criminal case; (d) to give evidence as a witness in judicial processes; (e) to intervene in judicial cases (e.g. as amicus curiae); (f) to undertake public interest civil litigation on the part of claimants or complainants; or (g) to report or refer cases of non-cooperation or obstruction of its processes for further action through judicial mechanisms. The recommended action calls on States to ensure that such options are available (to the extent relevant to the respective mandates and functions of the relevant mechanisms) (para. 3.5) and that transfers and referrals between State-based non-judicial mechanisms and judicial mechanisms take place in a manner which takes due account of the rights, interests and preferences of rights-holders (para. 3.3). These provisions should be read in conjunction with the recommended action relating to remedy pathways (see policy objective 2).

25. Conversely, judicial mechanisms can support the activities of State-based non-judicial mechanisms in a range of ways, including (where permitted under the domestic legal regime) by providing a route through which State-based mechanisms can compel the production of evidence (e.g. granting of a search warrant), and/or by providing a means of enforcement of remedies awarded or determined through non-judicial processes (para. 3.2). Judicial mechanisms can make an important contribution to the ability of certain State-based non-judicial mechanisms to provide remedial outcomes aligned with principles of adequate, effective and prompt reparations for harm suffered.[23] For instance, some State-based non-judicial mechanisms may have the ability to seek emergency orders from a court to prevent the continuation of a business-related human rights abuse. Moreover, State-based non-judicial mechanisms charged with the enforcement of binding legal standards may be able to seek assistance from judicial mechanisms in the enforcement of remedial outcomes.

26. Consistent with the approach to remedy pathways generally,[24] and to enable rights-holders and stakeholders to make effective use of State-based non-judicial mechanisms, the recommended action highlights the importance of access to information on the different circumstances in which (and the stages at which) judicial mechanisms may become involved in a complaint or dispute, and their rights to challenge decisions about transfers or referrals of complaints or disputes to other bodies (para. 3.4).

27. Overlapping proceedings can be problematic for several reasons. First, a lack of clarity on treatment of disclosures or admissions beyond the confines of the relevant proceedings may cause dilemmas for business enterprises as to whether and how to engage with the relevant mechanism. Second, because the prospect of inconsistent findings and/or remedial outcomes from overlapping processes is not only potentially contrary to principles of fairness and legal certainty, it can also undermine the effectiveness of remedies in individual cases. For these reasons, the recommended action highlights the need for States to anticipate and make appropriate provision for overlapping proceedings in the procedural

[22] See also A/HRC/17/31, principle 26, commentary.

[23] See paragraphs 30 and 31 below.

[24] See paragraphs 16-19 above.

rules of both judicial mechanisms and State-based non-judicial mechanisms consistent with standards of fairness, predictability, rights-compatibility and transparency (para. 3.6).

28. The remaining elements under policy objective 3 (paras. 3.7 and 3.8) are designed to encourage States to reflect on how the use of legal waivers, and procedures for transfer or referral of proceedings between different mechanisms may introduce further barriers to remedy. For instance, the imposition of a period of limitation[25] that does not take account of time spent exploring other remedial options, or subjecting parties to excessive delays in the course of a transfer or referral process, or unnecessary duplication of procedural steps, are examples of the kinds of potential barriers to remedy that States are encouraged to address.

4. Determination and enforcement of remedial outcomes

29. The recommended action under policy objective 4 calls on States to draw from international standards on access to remedy for human rights abuses as they consider how best to make use of State-based non-judicial mechanisms in business and human rights-related cases and their mandates, functions and powers. This should not be taken to imply that every State-based non-judicial mechanism must provide the full range of reparations contemplated in international standards. The types of remedies available, and the means by which they are implemented in individual cases, will depend on the mandates, functions and powers of the relevant mechanisms. The aim is to encourage States to consider ways in which accountability and remedy systems as a whole (which, as noted above, may include a range of different remedial options and pathways involving both judicial and non-judicial mechanisms), can offer a range of remedial outcomes, maximising the potential for delivery of effective remedies in individual cases by providing rights-holders with the range of options needed to enable them to seek and obtain remedies that meet their needs (para. 4.1).

30. The extent to which State-based non-judicial mechanisms take responsibility for overseeing implementation of remedial outcomes varies from one mechanism to another. Some (typically regulatory-type bodies) have self-executing powers of enforcement, whereas others (typically mediation-type bodies) have the ability and/or authority to carry out only minimal (if any) follow up. The recommended action recognises that different types of mechanisms have different roles to play but calls on States to take appropriate and timely steps to address the risk of non-implementation of remedial outcomes (para. 4.2). This provision should be read in conjunction with the recommended action on the ability of State-based non-judicial mechanisms to seek assistance from, to transfer and to refer matters to, judicial mechanisms (paras. 3.2, 3.3 and 3.4)[26] and also the recommended action under policy objective 2 (see paragraphs 16 to 19 above) relating to remedy pathways.

B. Improving the effectiveness of individual State-based non-judicial mechanisms relevant to the respect by business enterprises for human rights

1. Implementing the effectiveness criteria set out in the Guiding Principles for non-judicial mechanisms.

31. Principle 31 of the Guiding Principles[27] lays down seven effectiveness criteria applicable to State/based non-judicial mechanisms relevant to business respect for human rights: legitimacy; accessibility; predictability; equitability; transparency; rights-compatibility; and continuous learning (the "effectiveness criteria").

32. The recommended action under policy objective 5 highlights the importance of the effectiveness criteria as a benchmark (para. 5.1). It also takes account of the fact that some State-based non-judicial mechanisms are subject to regular review (e.g. performance or

[25] See Box 3 above.
[26] See paragraphs 25-27 above.
[27] See A/HRC/17/31, annex.

effectiveness reviews) by designated oversight bodies (e.g. treaty bodies or parliamentary bodies) or peer review bodies (para. 5.2).

33. During phase two of the Accountability and Remedy Project, OHCHR gathered information from State-based non-judicial mechanisms operating in a wide range of jurisdictions (representing different geographic regions and different domestic legal structures and traditions) about how they meet different aspects of the effectiveness criteria in practice.

34. Drawing from this information, the recommended actions under policy objectives 6 to 11 provide States with a series of illustrative examples as to the practical steps States can consider in order to improve the effectiveness of their State-based non-judicial mechanisms in general and their implementation of Guiding Principle 31[28] in particular.

2. Legitimacy (Guiding Principle 31(a))

35. As noted above,[29] a defining feature of a State-based non-judicial mechanism (as opposed to a judicial mechanism) is its relationship with the executive (rather than judicial) branch of government. This raises questions as to the appropriate level of independence of operation, in light of its particular mandate, functions and powers, to ensure that the mechanism has legitimacy and trust in the eyes of stakeholders.[30]

36. The recommended action under policy objective 6 makes a number of suggestions as to different ways to help strengthen and build stakeholder trust in State-based non-judicial mechanisms. These include providing the mechanism with sufficient resources and reflecting on the structural, institutional, governance, administrative and staffing arrangements needed to provide an appropriate level of operational autonomy (para. 6.1).

37. The manner in which a State-based non-judicial mechanism discharges its functions, particularly in the context of contested allegations, is relevant to building and maintaining stakeholder trust and enhancing legitimacy. The recommended action identifies a number of principles to govern the exercise of any powers of investigation that have been conferred (para. 6.2).

38. The extent to which a mechanism should be able to act independently and proactively, and the steps needed to achieve this, will vary depending on the nature of the mechanism and its mandate. Independent appointment panels for board members, or stakeholder representation on governing bodies, or the use of independent monitoring or advisory bodies, might work well in some settings, but will not necessarily be appropriate in others. The recommended action suggests that, where appropriate, provision should be made for rights-holders and other stakeholders to be able to raise concerns or complaints about different aspects of the performance or administration of State-based non judicial mechanisms (para. 6.3) or to request a review of specific decisions or determinations (para. 6.4). In some settings, the creation of a peer review system assessing a mechanism's performance has been valuable to drive up standards (para. 6.5).[31] These processes are distinct from the overall systemic review referred to under policy objective 1 (see para. 1.4 and paragraph 15 above).

39. The recommended action highlights the need for robust policies and procedures on conflicts of interest (para. 6.6). Depending on the structure and activities of the State-based non-judicial mechanism concerned, this could include employment and disciplinary policies and procedures, internal rotation of key personnel, and in some cases, the need for separation of functions to maintain the objectivity and independence of enforcement personnel.

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[28] See A/HRC/17/31, annex.

[29] See Box 1 above.

[30] See UN Guiding Principles on Business and Human Rights, Guiding Principles 31, Commentary (a).

[31] See, for instance, the peer review mechanism established for national contact points charged with advising on and promoting implementation of the Guidelines on Multinational Enterprises of the Organization for Economic Cooperation and Development.

3. Accessibility (Guiding Principles 31(b))

40. The Guiding Principles draws particular attention to the problem of "lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal".[32] The recommended action under policy objective 7 sets out practical steps to improve accessibility of individual State-based non-judicial mechanisms, drawing from existing State practice. These include working proactively to raise awareness among rights-holders about their mandates, functions and activities (para. 7.1),[33] taking steps to reduce, as far as possible, the costs of accessing such mechanisms (paras. 7.2 and 7.3),[34] giving publicity to sources of financial assistance (para. 7.3), and making processes as simple and straightforward as possible to reduce the need for legal counsel, where appropriate,[35] while at the same time preserving the possibility of assistance from third parties (such as family members, carers or interpreters) (para. 7.4). Flexible rules on standing (i.e. allowing certain persons or entities to bring a claim on someone else's behalf) can help to improve access to remedy for people who fear acts of intimidation and reprisals. Other steps that can be taken to improve accessibility include giving people choice on how to engage with mechanisms (e.g. on-line, by phone, in person, by letter) (para. 7.5) and offering special assistance services such as dedicated caseworkers, downloadable "self-help" kits or support through "triage" systems (para. 7.6).[36] The recommended action stresses the importance of materials and resources being made available in different formats to meet the needs of persons with disabilities (para. 7.7) and adjustments to premises and facilities to improve physical and communicational accessibility (para. 7.9).

41. Some State-based non-judicial mechanisms impose periods of limitation on complaints or disputes. The recommended action draws attention to the potential for such procedural rules to undermine accessibility of State-based non-judicial mechanisms and suggests issues to be taken into account in setting a period of limitation (para. 7.8).

42. The recommended action highlights the importance of taking steps to protect confidentiality in certain cases as well as appropriate policies to ensure the physical safety and well-being of rights-holders (particularly those who may be at heightened risk of vulnerability or marginalization), as they engage with the relevant mechanism and its personnel (para. 7.10). Such policies should be clearly communicated to all relevant personnel, and appropriately linked to relevant complaints and disciplinary procedures, in accordance with the law and good management practice. Robust background legislation and enforcement regimes relating to confidentiality, privacy, safeguarding, and whistle-blower protection can contribute to the accessibility of State-based non-judicial mechanisms in practice (paras. 7.11 and. 7.12).

4. Predictability (Guiding Principle 31 (c))

43. OHCHR research into State/based non-judicial mechanism "best practice" suggests that the need for clarity with respect to procedure and relevant time frames is already widely recognised. Many State-based non-judicial mechanisms make use of a variety of means to inform rights-holders and other stakeholders about processes and procedures, including through on-line resources, videos and "what to expect" leaflets The recommended action under policy objective 8 makes a number of suggestions as to

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[32] See A/HRC/17/31, principle 31 commentary

[33] See also paras. 2.1, 2.2 and 2.3 of the recommended action, which concerns the need for rights-holders to have access to information about the different remedial courses of action potentially open to them, and the advantages and disadvantages of each.

[34] E.g. user fees, costs of legal counsel, translation costs, cost of expert witnesses, travel and accommodation costs, and costs associated with preparation and submission of documents and testimony.

[35] Note that for regulatory or enforcement-type cases (as opposed to dispute resolution type processes), prosecution of the matter will often be in the hands of the mechanism itself, in many cases negating the need for rights-holders to retain their own legal counsel.

[36] Note that this part of the recommended action is distinct from, though related to, the elements under policy objective 2 (paras. 2.1, 2.2 and 2.3) relating to information, advice and support to rights-holders to help with the identification of potential remedy pathways.

information that should be conveyed to rights-holders and other stakeholders in the interests of predictability (para. 8.1)

44. In some contexts the publication of information about past cases (e.g. how they were handled, and the remedial outcomes) can help improve predictability, and trust in, the processes of State-based non-judicial mechanisms. However this will not be appropriate to all kinds of State-based non-judicial mechanisms (e.g. mediation type mechanisms that rely for their effectiveness on the willingness of parties to participate based on assurances of confidentiality). In some contexts and circumstances, publication of information identifying the complainant or witnesses may be inappropriate, counter-productive or unlawful. The recommended action is designed to encourage States to reflect on the level of publication (e.g. using redacted information or aggregated information) that may be appropriate and desirable to enhance public understanding of the complaints handling and/or dispute resolution processes and methodologies in use, and to make this information available in a readily understandable format (para. 8.2).

5. Equitability (Guiding Principle 31(d))

45. As the Guiding Principles note, "in grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them".[37] The recommended action in policy objective 9 highlights the importance of access to information about sources of advice and assistance to enable rights-holders to participate fairly and effectively in mechanisms' processes (para. 9.1).

46. Research in phase two of the Accountability and Remedy project suggests that there is a high degree of consensus from jurisdiction to jurisdiction as to the basic elements of procedural fairness. The recommended action draws from these findings and highlights the need for procedures to provide for adequate and timely provision of information, opportunities to comment before decisions are made, written reasons for final determination and rights of parties to challenge decisions (para. 9.2).

47. Procedural rules that commit rights-holders to pursuing remedies through non-judicial mechanisms, and which remove the option of judicial recourse, can present serious barriers to effective remedy. The recommended action highlights the need for rights-holders to have the flexibility to withdraw from non-judicial mechanisms in certain circumstances and to retain the right to seek remedies using judicial mechanisms (para. 9.3).[38] This provision should be read in conjunction with the recommended action under policy objective 3 (particularly paras. 3.6, 3.7 and 3.8).

48. Fairness can be undermined if decision-makers within State-based non-judicial mechanisms are faced with conflicts of interest. The recommended action draws attention to the need for suitable policies, procedures and practices to ensure that conflicts are identified and declared, and that the mechanism responds appropriately (para. 9.4).

6. Transparency (Guiding Principle 31(e))

49. In practice, State-based non-judicial mechanisms can take a number of different steps to improve transparency, not just in handling specific complaints and/or dispute resolution processes but also with respect to their operating policies, procedures and wider performance and impact. Some State-based non-judicial mechanisms have been making use of new technologies to improve the speed, effectiveness and communication between themselves and relevant stakeholder groups. Innovations include e-filing systems, video-conferencing and password protected on-line accounts to enable participants in complaints handling or dispute resolution processes to track the progress of procedures and to respond more easily to requests for information.

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[37] A/HRC/17/31, principle 31, commentary (d).

[38] See also comments above on remedy pathways and the need to offer some degree of choice to rights-holders (paragraphs 16-19 above) and also need to take account of the fact that there will be cases in which judicial remedy is the only effective remedy (paragraph 23 above).

50. The recommended action in policy objective 10 highlights steps to enhance transparency of State-based non-judicial mechanisms. These include working proactively to ensure that information useful to rights-holders and their representatives is conveyed to the relevant individuals and communities in a readily understandable format (para. 10.1), keeping participants in processes informed of key developments and requirements (para. 10.2) and publishing periodic (typically annual) reports on activities and performance (para. 10.3).

51. The recommended action also highlights the importance of domestic legal regimes relating to freedom of access to government information as a means of enhancing transparency of State-based non-judicial mechanisms in general (para. 10.4).

7. Rights-compatibility (Guiding Principle 31(f))

52. The Guiding Principles observes that "grievances are frequently not framed in human rights terms and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognised human rights"[39] The recommended action under policy objective 11 therefore reminds States of the need for State-based non-judicial mechanisms to be administered, and to be given mandates and functions, that are consistent with international human rights standards (para. 11.1), and aligned with internationally recognised procedural and substantive components of an effective remedy (para. 11.2).

53. Additionally it reflects elements of good practice identified in the course of phase two of the Accountability and Remedy Project, which are relevant to the international standard of "prompt, adequate and effective" remedy in cases of human rights violations. There is a need to ensure that requests by rights-holders and their representatives are responded to in a timely fashion (para. 11.3). Where relevant, in light of the mandate, functions and powers of the mechanisms in question, there should also be provision for prioritisation of responses and/or preventative action in cases posing a risk of severe or irremediable harm (para. 11.3).

54. Depending on their mandate and functions, State-based non-judicial mechanisms may be able to offer a range of remedies including regulatory, restorative and/or preventative remedies as well as financial remedies (punitive and/or compensatory). The recommended action recognises that the eventual realisation of a remedy both "adequate" and "effective" is more likely with the active and meaningful involvement of the affected rights-holders and their representatives (para. 11.3).

55. The recommended action also encourages States to reflect on the different ways in which creating opportunities for consultation with rights-holders can enhance accountability and access to remedy. For instance, State-based non-judicial mechanisms which may abandon, defer or settle claims and/or disputes at their own initiative (including subject to terms) should be prepared to consult rights-holders and their representatives in advance of a decision not to proceed with a complaints handling or dispute resolution process (e.g. because of an agreement between the mechanism and the business enterprise concerned to defer proceedings pending an attempt to achieve compliance) (para. 11.3). Moreover, the recommended action suggests that the availability of effective remedies through other means should be considered in a decision whether or not to bring an end to, or defer, a process (para. 11.4).

56. Not all of the relevant State-based non-judicial mechanisms have mandates that are explicitly framed in human rights terms. Within such mechanisms, there may not be the necessary levels of awareness among key personnel and decision-makers of the mechanism's role and responsibilities with respect to human rights. However, some State-based non-judicial mechanisms have taken steps to raise awareness among staff about relevant human rights standards (e.g. obligations with respect to non-discrimination, or indigenous peoples' rights) and the practical steps that can be taken to ensure that complaints and disputes are handled and progressed in a rights compatible way. The

[39] A/HRC/17/31, principle 31, commentary (f)

recommended action highlights the importance of staff training programmes on human rights issues generally and the cultural needs and preferences of the communities served by the relevant mechanisms, as well as the need to ensure that personnel have access to relevant human rights expertise as needed (para. 11.5). NHRIs have a potentially important role to play in this regard.

8. Continuous learning (Guiding Principle 31(g))

57. Not all State-based non-judicial mechanisms have policy making and advisory functions. Nevertheless, the recommended action under policy objective 12 reminds States that State-based non-judicial mechanisms can be a vital source of information with respect to the effectiveness or otherwise of different regulatory strategies and techniques, in different sectors and operating contexts. They are also a potentially important source of expertise when it comes to the formulation of law reforms aimed at improving the effectiveness of State-based mechanisms and enhancing their contribution to accountability and remedy in business and human rights cases (para. 12.1). In light of this, the recommended action suggests that State-based non-judicial mechanisms be asked, where relevant and appropriate, to report upon and make recommendations with respect to compliance related issues apparent in their various activities (para. 12.2). States are also encouraged to take steps to enable greater dissemination of know-how and lessons learnt by State-based non-judicial mechanisms among other domestic bodies and regulatory agencies that play a part in raising standards of business enterprises with respect to human rights.

C. Improving the effectiveness of State-based non-judicial mechanisms in cross-border cases

Box 4: Key concepts 4

"Cross-border cases" refers to complaints and/or disputes arising from business-related human rights abuses in which the relevant actors, evidence, facts, harms, and/or witnesses are located in more than one State.

Issues relevant to cross-border cooperation between State-based non-judicial mechanisms

58. Few State-based non-judicial mechanisms have mandates relating to extraterritorial business-related human rights abuses. A notable exception is the national contact point (NCP) system established to promote and assist with the implementation of the Guidelines on Multinational Enterprises of the OECD (the "OECD Guidelines"). National contact points based in the jurisdictions of adhering States to the OECD Guidelines have been called upon to handle complaints on allegations of business involvement in human rights abuses in other States (including non-adhering States) on a number of occasions.[40]

59. However, there have recently been instances in which State-based non-judicial mechanisms (and particularly NHRIs) have entered into ad hoc arrangements with regulatory agencies from other States to address business and human rights challenges that appear to be cross-border in nature.

60. The recommended action under policy objective 13 encourages States to support the involvement of State-based non-judicial mechanisms in cross-border cases where their mandates and functions permits, and to make appropriate adjustments to the mandates and functions of these mechanisms to enhance their ability to respond to cross-border human rights risks in the future (para. 13.1).

[40] OECD (2017), *Annual Report on the OECD Guidelines for Multinational Enterprises 2016*, available at http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf.

61. Whereas cross-border cooperation in judicial cases is typically formal in nature (for instance, when it makes use of diplomatic channels of communication or relies on international mutual legal assistance regimes),[41] cross-border cooperation by State-based non-judicial mechanisms carries the possibility of greater flexibility, for instance in the use of informal and ad hoc arrangements.

62. In the comparatively limited circumstances in which State-based non-judicial mechanisms can and do involve themselves in cross-border cases, they can face significant practical and logistical challenges when it comes to gathering evidence about extraterritorial business-related human rights abuses. Much depends on the level of cooperation of the authorities in the State where the harm has occurred. In such cases, some NCPs under the OECD Guidelines have found foreign embassies to be a useful source of information and support in practice.

63. Experience within the NCP system has shown that good working relationships between personnel working within State-based non-judicial mechanisms and their counterparts in other States can be promoted through the use of regulatory networks and other regional or multilateral initiatives aimed at encouraging the sharing of know-how on regulatory, complaints handling and dispute resolution best practices and the dissemination of information to stakeholders.

64. For these reasons, the remaining elements under policy objective 13 focus on the action that could enhance the quality and effectiveness of informal contacts between practitioners working within State-based non-judicial mechanisms in different States with a view to creating cultures and relationships that are more supportive of, and provide more opportunities for, joint and/or coordinated responses to cases of business-related human rights abuses that are, or appear to be, cross border in nature (paras. 13.2, 13.3, 13.6 and 13.7). The potential importance of embassies and consular services as a source of assistance (para. 13.4) and as a means of awareness-raising about the complaints handling and dispute resolution options that may be available (para. 13.6) is also recognised.

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[41] See A/HRC/32/19/Add.1, paragraphs 32-38.